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Recommended Citation

James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. Rev. 665 (2004).
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Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional

By JAMES McGRATH*

ABSTINENCE-ONLY AND abstinence-only-until-marriage education programs, ostensibly designed to prevent unwanted pregnancy and sexually transmitted disease (“STD”) infection, are a waste of valuable public health resources of both time and money.¹ These ideologically based interventions interfere with serious, effective public health education and must be dismantled. Not only are abstinence-only programs ineffective for their intended purpose, they are dangerous in that they fail to protect our nation’s youth against serious and potentially deadly diseases. Furthermore, these programs unconstitutionally violate both the Establishment Clause and the unconstitutional conditions doctrine.

It may be true that if every teen abstained from sex, pregnancy and STDs would be eradicated among this nation’s youth. However, contrary to the beliefs of supporters of abstinence-only education, there has been no scientific evidence proving that abstinence-only education reduces teen sexual activity or the rate of teen pregnancy and STD transmission.² Policies that intrude on educators’ ability to frankly discuss sex make it difficult to adequately prepare adolescents

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1. This article will address issues that are relevant to abstinence-only and abstinence-only-until-marriage programs, referring to both under the more inclusive term “abstinence-only,” unless the discussion concerns only abstinence-only-until-marriage.

2. See STAFF OF H.R. COMM. ON GOV’T REFORM, 108TH CONG., POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION 4 (Comm. Print 2003), *available at* http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf (citing D. KIRBY, NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY 88 (May 2001)). The fact that this effect is not intuitive does not make it any less real.

to protect themselves from unwanted pregnancy and STDs. However, the current administration is apparently not content with funding unproven methods—it now also chooses to thwart realistic efforts that have been proven to decrease the incidence rate of HIV and other STDs through funding mandates that seek to silence realistic sexual education.

All of the credible studies performed to date have stressed the effectiveness of and the need for comprehensive sex education.³ Comprehensive programs, often called “abstinence plus,” teach other strategies for avoiding unwanted pregnancies and STD infection in addition to abstinence. Yet, in the face of overwhelming evidence against the continued use of abstinence-only programs, supporters of abstinence-only programs have maintained their insistence on further funding of these programs. President Bush, for example, has recently proposed doubling the current funding for abstinence-only programs to \$270 million for fiscal year 2005.⁴

Although the federal government currently has no such affirmative duty to do so, it nevertheless funds the education of adolescents to help them avoid pregnancy and sexually transmitted diseases. The federal government grants over \$100 million annually to states to promote abstinence-only education for teenage sexuality counseling.⁵ Beginning with the Adolescent Family Life Act of 1981 (“AFLA”),⁶ funding for abstinence-only education has been given to states through federal matching grants. Later, through the 1996 Welfare Reform Legislation, Congress also provided funding to states that promoted its abstinence-only message to welfare recipients.⁷ Although the arguments for these statutes’ constitutional compliance have always been tenuous, the unsurprising revelation that these programs are ineffective further erodes the past rationalizations used to justify their continuance.

The majority of these abstinence-only programs are produced and run by religious organizations, a fact that spawned litigation when

3. *See id.*

4. Press Release, Sexuality Information and Education Council of the U.S. (“SIECUS”), President Proposes \$270 Million for Unproven Abstinence-Only-Until-Marriage Programs for FY 2005 (Feb. 3, 2004) (on file with U.S.F. Law Review), available at <http://www.siecus.org/media/press/press0049.html> (last accessed Aug. 27, 2004).

5. *See* STAFF OF H.R. COMM. ON GOV'T REFORM at 4.

6. Adolescent Family Life Act, 42 U.S.C. §§ 300z(a)(1)–300z(a)(10) (2000).

7. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 912, 110 Stat. 2105 (1996).

these programs were first introduced.⁸ At trial, federal funding to states for teaching abstinence-only to adolescents was ruled constitutional in First Amendment and Due Process Clause challenges.⁹ The Supreme Court held that abstinence-only programs did not violate the United States Constitution's Establishment Clause,¹⁰ as the morals promoted by these programs merely "coincided" with the morals of certain religions.¹¹ However, when examining these programs and their new restrictions in light of recent scientific evidence revealing their ineffectiveness to prevent pregnancy and STDs, it becomes clear that they fail to meet constitutional muster. Because the abstinence-only education programs fail to protect the health of this nation's youth, their sole effect is reduced to promoting a particular religious viewpoint, in violation of the Establishment Clause.

Furthermore, because an overwhelming majority of parents want their children to receive comprehensive sex education, it is difficult to understand exactly what secular morals are being promoted by these programs, given their ineffectiveness for their stated purpose.¹² Beyond the ideological rhetoric, because unwanted teen pregnancies and transmission of sexually transmitted diseases are public health concerns, strictly moral considerations must take a back seat to protecting the health of this nation's adolescents.

The most recent program to fund abstinence-only education is Special Projects of Regional and National Significance—Community Based Abstinence Education ("SPRANS-CBAE"), which began funding programs in 2001, deriving its funding through a block grant designated for mother and child health services.¹³ Administered by the Department of Health and Human Services, this program violates the unconstitutional conditions doctrine by forbidding states from even using their own funds to teach anything other than abstinence as a

8. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 603 (1988).

9. *Id.* at 593.

10. U.S. CONST. amend. I. The Establishment Clause of the First Amendment provides, "Congress shall make no law respecting the establishment of religion." *Id.*

11. See *Bowen*, 487 U.S. at 603. As discussed *infra*, the promoted morals specifically coincide with Judeo-Christian morals, though the issue is not limited to these.

12. See HENRY J. KAISER FAMILY FOUND. ("KAISER FOUNDATION"), SEX EDUCATION IN AMERICA: A SERIES OF NATIONAL SURVEYS OF STUDENTS, PARENTS, TEACHERS AND PRINCIPALS (Sept. 2000), http://www.kaisernetwork.org/health_cast/uploaded_files/Sex_Education_in_the_U.S2000.pdf.

13. See CHRIS COLLINS ET AL., AIDS RESEARCH INST., UNIV. OF CAL., S.F., ABSTINENCE ONLY VS. COMPREHENSIVE SEX EDUCATION: WHAT ARE THE ARGUMENTS, WHAT IS THE EVIDENCE? 6 (2002).

condition to receiving these funds.¹⁴ Grantees of these funds are expressly forbidden from using funds from outside the grant to provide "other education regarding sexual conduct in the same setting."¹⁵ Because, as a practical matter, there is no alternative setting in which recipients of the funds could teach comprehensive sexual education, Congress has effectively barred the recipients from teaching safer sex at all. As such, this program requires states to abandon more comprehensive educational programs in order to qualify for this funding.

Additionally, separate federal funding for education to reduce the transmission of HIV requires that no federal money be spent in a way that promotes or encourages homosexual activity.¹⁶ As such, the abstinence-only-until-marriage programs should also be scrutinized for their failure to address the interests of gay and lesbian adolescents. Further, these programs teach abstinence until *marriage*—although this is not always the best approach for young people in general, it is particularly ineffective for lesbian and gay youth.¹⁷ Because there is generally no possibility of marriage for gays and lesbians, and Congress appears to be doing everything it can to prevent the future possibility of it,¹⁸ these young people are being told, in effect, to sustain a life of celibacy.¹⁹

Further, organizations that provide educational outreach using frank and explicit language to gay and lesbian teens utilizing funds from non-federal sources have lately been the subject of harassing financial audits to ensure that federal money was not used in compre-

14. See Notice of Availability of Funds, 68 Fed. Reg. 68,632 (Dec. 9, 2003) (offering funding for *only* abstinence-only sex education).

15. See *id.*

16. 42 U.S.C. § 300ee(c)(2003).

17. For brevity's sake, this article will only refer to gays and lesbians, but is not meant to exclude others who may have sex with partners of the same sex, including, but not limited to, bisexuals.

18. Consider, for instance, the not yet ripe issues involved in the Defense of Marriage Act ("DOMA") and some congressional members' calls for a constitutional amendment that would forbid "gay marriage." The recent Massachusetts Supreme Court ruling in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), permits same sex couples to marry legally in Massachusetts, as of the time of this writing. Efforts are underway at the state and federal level to undermine the effect of this ruling.

19. At the time of this writing, in defiance with state laws to the contrary, San Francisco and New Paltz, New York issued marriage licenses to same sex couples until courts ordered them to desist as President George W. Bush advocated for a constitutional amendment prohibiting "gay marriage."

hensive sex education.²⁰ These audits squander the scant resources of these organizations so as to reduce their ability to operate.

Part I of this Article reviews the history of abstinence-only education funding legislation and explores some of the inconsistencies these laws inflict into the struggle to protect the health of this nations' adolescents. Part II discusses the effect of these abstinence-only programs on HIV/STD prevention. Part III addresses how these programs fail to address the needs of gay and lesbian students. Part IV addresses the constitutional deficiencies of current federal funding for abstinence-only education. Finally, Part V suggests ways of implementing comprehensive sexual education.

I. Abstinence-Only Education

Federally-funded abstinence-only programs stress the "certainty" of avoiding infection or unwanted pregnancy by remaining abstinent. At first glance, such programs may appear to be an intuitive approach to reducing teen pregnancies and incidence of STDs among adolescents—after all, teens who are not having sexual relations will obviously not become pregnant or infected with an STD. Abstinence-only programs are nevertheless problematic because abstinence is taught as the only prevention method. Comprehensive sexual education programs (sometimes called "abstinence plus") that teach abstinence as part of a holistic approach to teen sexuality better protect the health of adolescents because, as evidenced by rates of teenage sexual activity, many teenagers are not abstinent.²¹ Almost half of all United States adolescents have had sexual relations prior to graduating from high school, and around 900,000 teens between the ages of fifteen to

20. See CHRISTOPHER HEALY, SALON.COM, NO SEX, PLEASE—OR WE'LL AUDIT YOU (OCT. 28, 2003), at http://archive.salon.com/mwt/feature/2003/10/28/abstinence/index_np.html (last accessed Apr. 19, 2004).

21. See Jo Anne Grunbaum et al., *Youth Risk Behavior Surveillance ("YRBS")—U.S., 2001, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES (CDC)*, June 28, 2002, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5104a1.htm> (last accessed Aug. 28, 2004) ("In 2001, 45.6% of high school students had ever had sexual intercourse; 42.1% of sexually active students had not used a condom at last sexual intercourse; and 2.3% had ever injected an illegal drug."). These are fairly conservative estimates. Others report as many as 61% of high school adolescents are engaging in sexual relations. U.S. Newswire, SIECUS Releases New Groundbreaking Publication: SIECUS State Profiles: A Portrait of Sexuality Education and Abstinence-Only-Until-Marriage Programs in the States (June 22, 2004), available at <http://releases.usnewswire.com/GetRelease.asp?id=102-06222004> (last accessed Aug. 28, 2004).

nineteen become pregnant annually.²² Approximately four million cases of STDs occur annually among teens,²³ and one in four new cases of HIV infection happens to someone under the age of twenty-two.²⁴

Although the incidence of teen pregnancy has actually decreased in the past decade, the rate of HIV infection has nevertheless remained constant in young people—and experts believe it will soon again be on the rise.²⁵ Especially at risk for HIV infection are males who have sex with other males (“MSM”).²⁶ Comprehensive programs offering multiple strategies to avoid these dangers have been documented to be effective, but there have been no peer-reviewed studies that have shown abstinence-only programs are effective for their stated purpose.²⁷

The abstinence-only approach is rooted in morals that courts have noted “coincide” with Judeo-Christian morals.²⁸ However, teaching children only about abstinence to protect themselves from unwanted pregnancy and STDs is an unrealistic approach, given that even many religious adults are unable to practice abstinence themselves.²⁹ There is no shortage of examples of the devout engaging in

22. See Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 HASTINGS CONST. L.Q. 585, 593 (2000) (citing ALAN GUTTMACHER INST., *TEENAGE PREGNANCY: OVERALL TRENDS AND STATE-BY-STATE INFORMATION SUMMARY*, at tbl. 3 (1999)).

23. *Id.* (citing KAISER FOUND. & THE AM. SOC. HEALTH ASS'N, *SEXUALLY TRANSMITTED DISEASES IN AMERICA: HOW MANY CASES AND AT WHAT COST?* 4, 8 (1998)); see also Press Release, Kaiser Foundation, M.T.V. & Teen People, What Teens Don't Know About STDs Puts Them at Risk: A National Survey Finds Few Sexually Experienced 15–17 Year Olds Get Tested for STDs, And Most Underestimate Their Risk (Mar. 8, 1999) (on file with author), available at <http://www.kff.org/youthhivstds/1465-stds.cfm>.

24. See Arndorfer, *supra* note 22, at 593.

25. *Advancing HIV Prevention: New Strategies for a Changing Epidemic—United States*, 2003, 52 MORBIDITY & MORTALITY WKLY. RPT. 329, 329–32 (Apr. 18, 2003).

26. MSM is used to reflect the fact that males who are not gay or even bisexual may share sexual relations with other males. As discussed *infra*, many sexual practices between same sex couples may not even be thought of as sex. Similarly confounding to early researchers of AIDS/HIV, many men who are considered to be gay or bisexual do not identify as such and thus were immune to many early public health interventions. The definition of who is gay or bisexual is not static among various nations, cultures, or religions. When addressing issues of males having sex with males—not just issues of gay males—the more inclusive term should be used.

27. See COLLINS ET AL., *supra* note 13; U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE SURGEON GENERAL'S CALL OF ACTION TO PROMOTE SEXUAL HEALTH AND RESPONSIBLE SEXUAL BEHAVIOR*, <http://www.surgeongeneral.gov/library/sexualhealth/call.htm> (last accessed July 9, 2001).

28. See *Bowen v. Kendrick*, 487 U.S. 589, 612–13 (1988).

29. See Michael Paulson, *Abuse Study Says 4% of Priests in U.S. Accused*, BOSTON GLOBE, Feb. 17, 2004, http://www.boston.com/globe/spotlight/abuse/stories5/021704_study.htm.

"immoral" sex; a recent example can be found in the discovery of many cases of sexual abuse of children by Catholic priests.³⁰

Promoting a strictly "moral-based" effort in lieu of a concerted scientific public health approach to this problem further complicates an already difficult issue by introducing additional ambiguity regarding sexual activity. Although abstinence-only programs teach adolescents not to have sex, it is unclear from many of their curricula what exactly is considered sex or even abstinence in these programs. Teens, as well as the public in general, have far differing views as to what the words sex³¹ or abstinence³² mean. Abstinence-only graduates may be engaging in behaviors that they may not consider sex but may still expose them to STDs.³³ By not engaging in vaginal intercourse, but instead experiencing anal intercourse and oral sex, many adolescents and adults believe they are practicing abstinence.³⁴ Although they might not be exposing themselves to causing or enduring an unwanted pregnancy, some of these activities that teens may not even consider to be sex expose them to a high risk for transmission of STDs, including HIV.³⁵ Unfortunately, there is little recent rigorous scientific research in this area, likely due to the lack of federal funding

30. See *id.*

31. It was a source of much entertainment for the American public to learn in 1998 that their president did not consider oral sex to be sex. It turned out that many other Americans shared his definition of sex. In one recent study, adolescents 12–17 years of age reported that 31% of females and 44% of males "strongly agree" or "somewhat agree" that oral sex is not as big a deal as sexual intercourse. See KAISER FOUND., SEXSMARTS SURVEYS: RELATIONSHIP: A SERIES OF NATIONAL SURVEYS OF TEENS ABOUT SEX 1–4 (Oct. 2002), http://www.kff.org/entpartnerships/seventeen_surveys.cfm.

32. In a 1994–95 study of college freshman, 61% believed mutual masturbation to be abstinent behavior; 37% believed the same of oral sex as did 24% about anal intercourse. See P.F. Horan et al., *The Meaning of Abstinence for College Students*, 2 HIV/AIDS PREVENTION & EDUC. ADOLESCENTS & CHILDREN, 51, 51–66 (1998).

33. The general public is largely ignorant about the most common STD, which may be transmitted through intimate contact that might not be considered sex by a majority of people. Human papilloma virus ("HPV") is thought to infect about 50% of the reproductive-aged United States population. CDC, STD PREVENTION, GENITAL HPV INFECTION (July 2004), at <http://www.cdc.gov/std/HPV/STDFact-HPV.htm#common> (last accessed July 28, 2004).

34. See Lisa Remez, *Oral Sex Among Adolescents: Is It Sex or Is It Abstinence?*, 32 FAM. PLAN. PERSP. 298, 302 (2000), <http://www.agi-usa.org/pubs/journals/3229800.html> (Dec. 2000). Even health educators are apparently confused. In an e-mail survey of seventy-two health educators, 30% responded that oral sex was abstinent behavior, and 29% replied that mutual masturbation was not. *Id.*

35. See *id.* (citing Martha A. Schuster et al., *The Sexual Practices of Adolescent Virgins: Genital Sexual Activities of High School Students Who Never Had Vaginal Intercourse*, 86 AM. J. PUB. HEALTH 1570, 1575 (1996)). In one study, about one third of adolescents identified themselves as virgins in spite of the fact that they engaged in oral sex, while one percent of these self-identified "virgins" had engaged in anal sex.

available to research such issues.³⁶ Although some programs do provide definitions, the many abstinence-only programs, as administered, do not agree on how to define sex or abstinence.³⁷

Condoms are considered one of the most effective means of helping to prevent HIV and other STD transmission.³⁸ Efforts to stop the spread of HIV are likely hampered by the effects of abstinence-only federal funding that renders many adolescents unable to protect themselves when many of them eventually do have sex by not knowing the facts concerning condoms, nor of their proper use.³⁹

Many abstinence-only programs rely heavily on scare tactics and incomplete or misleading information.⁴⁰ For example, a study is often cited as showing that thirty percent of sexually active teens contract an STD, including those who used condoms for protection.⁴¹ The study focused on contraception, but also measured incidence of "new" STD infection. Some of the participants came to the study having already been infected at least once with an STD.⁴² However, the use of condoms in the study is somewhat distorted. Although participants who chose condoms for their method of contraception had similar rates of new infection for STDs as other types of contraception, the study also noted participants used condoms only about fifty percent of the times they had sexual relations.⁴³ Condom failure rates are often exaggerated by including improper or inconsistent use issues as a "condom

36. Debate in 1992 over federal funding for comprehensive sexuality studies is considered to have a chilling effect on researches in this area of study. See D. DiMauro, *Sexuality Research in the U.S.: An Assessment of the Social and Behavioral Sciences*, New York: Social Science Research Council 1995. The concern about ideology driving decisions of science is hardly new—the conservatives labeled such studies as "reprehensible sex surveys" whose purpose was to "legitimize homosexuality and other sexually promiscuous lifestyles." 138 CONG. REC. S4708, 4737 (daily ed. Apr. 2, 1992) (statement of Rep. Helms).

37. See Remez, *supra* note 34, at 302.

38. CDC, *CONDOMS AND THEIR USE IN PREVENTING HIV INFECTION AND OTHER STDs* (Sept. 1999), available at http://www.house.gov/reform/min/pdfs/pdf_inves/pdf_admin_hhs_info_condoms_fact_sheet_orig.pdf.

39. Although condoms do sometimes fail, the rate of failure is rather small, especially when a condom is used properly. Many abstinence-only programs distort the failure rates or offer information that condoms are exceptionally difficult to use. See SEICUS, *POLICY UPDATE* (Oct. 2002), at www.siecus.org/policy/PUupdates/arch02/arch020035.html.

40. See Monnica Terwilliger Williams, *Responsible Sexual Choices and You: Let's Talk About Safe Sex*, (Jan. 7, 2003), at <http://www.epigee.org/guide/sexuality.html> (citing L.M. Dinerman et al., *Outcomes of Adolescents Using Levonorgestrel Implants vs. Oral Contraceptives or Other Contraceptive Methods*, 149 *ARCHIVES PEDIATRIC & ADOLESCENT MED.* 967, 967–72 (1995)).

41. *Id.* The results are worded in such a way to imply that 30% of condom users got infected with an STD.

42. *Id.*

43. *Id.*

failure.”⁴⁴ Promoters of abstinence-only relying upon this study also neglect to mention that the experts reporting this study ultimately recommended some barrier method, such as condoms, for sexually active adolescents using implants or oral contraceptives.⁴⁵

Although there is almost no scientific support for the efficacy of abstinence-only programs, the current Bush administration misleads the public about their impact, stating “abstinence has a proven track record of working.”⁴⁶ Supporters of abstinence-only programs often hold up Uganda’s successful program as a model in reducing the spread of HIV. However, though the program teaches abstinence and stresses monogamy, it also advocates the use of condoms,⁴⁷ a practice the Bush administration is decidedly against. The Bush administration notes that the pregnancy rate among adolescents in the United States has been falling in the past decade and attributes this effect to the advent of abstinence-only programs.⁴⁸ To the contrary, most scientific studies show it is more likely due to increased use of some form of birth control.⁴⁹

Under the Clinton administration, the Department of Health and Human Services (“HHS”) developed scientifically-based outcome measures to track abstinence-only programs’ effectiveness.⁵⁰ The Bush

44. *See id.*

45. *Id.*

46. Ari Fleisher, White House Press Briefing (Jan. 27, 2003), at <http://www.whitehouse.gov/news/releases/2003/01/20030127-2.html>.

47. Tom Carter, *Uganda Leads by Example on AIDS*, WASHINGTON TIMES, Mar. 13, 2003, at <http://www.usaid.gov/press/releases/2003/uganda030313.html> (last accessed May 20, 2004) (“ABC stands for ‘Abstinence, Be faithful, or use Condoms.’”).

As an AIDS physician who has been involved in Uganda’s response to AIDS for twenty years, I fear that one small part of what let to Uganda’s success—promoting sexual abstinence—is being overemphasized in policy debates. While abstinence has played an important role in Uganda, it has not been a magic bullet.

Julian Meldrum, *Expert Panel Maps Global ‘HIV Prevention Gap’: \$6 Billion Needed by 2007*, <http://new.hst.org.za/news/index.php/20030523> (last accessed Dec. 2, 2003) (quoting David Serwadda, Director of the Institute of Public Health at Makerere University in Uganda).

48. Ari Fleisher, White House Press Briefing (Jan. 27, 2003), at <http://www.whitehouse.gov/news/releases/2003/01/20030127-2.html>.

49. An Alan Guttmacher Institute analysis examining reasons for declining teen pregnancy rates between 1988 and 1995 found that three-quarters of the decrease was due to improved contraceptive use, while one-quarter was due to delayed sexual activity. ALAN GUTTMACHER INST., WHY IS TEENAGE PREGNANCY DECLINING? THE ROLES OF ABSTINENCE, SEXUAL ACTIVITY AND CONTRACEPTIVE USE 9–11, available at http://www.guttmacher.org/pubs/or_teen_preg_decline.html (last accessed July 23, 2004).

50. *See* STAFF OF H.R. COMM. ON GOV’T REFORM, 108TH CONG., POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION 4 (Comm. Print 2003), available at http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf.

administration replaced these measurable standards with alternative criteria that do not measure any actual outcomes, such as pregnancy or incidence of STDs, but instead measure *attendance* and *attitudes* of program participants at the end of the program.⁵¹

There has been little scientific evaluation of any abstinence-only program. Proponents of these programs cite to the scant support available, including an article in the *Portland Oregonian*, a masters dissertation, and a report from the Michigan Department of Community Health.⁵² However, there are few rigorous peer-reviewed scientific articles on the efficacy of abstinence-only programs. One study evaluating programs taught by adults and peers in California found no measurable impact on the teenagers' sexual activities.⁵³ While the study found that it was not likely an effect of the programs, those who were taught by peers in abstinence-only programs were actually found to be more likely to report becoming pregnant or causing a pregnancy.⁵⁴

Another study that is often touted as proving abstinence-only works features a program that appears to show promise by revealing a lower incidence of sexual activity among students who take a virginity pledge.⁵⁵ The intended effect is to create a feeling in the students that they are part of a special group making such a pledge.⁵⁶ The study also shows, however, the effect only occurs when small groups of students take the pledge.⁵⁷ As the effect of such programs fails in large

51. These new measures include: the proportion of program participants who successfully complete or remain enrolled in an abstinence-only education program; the proportion of adolescents who understand that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy and sexually transmitted disease; the proportion of adolescents who indicate understanding of the social, psychological, and health gains to be realized by abstaining from premarital sexual activity; the proportion of participants who report they have refusal or assertiveness skills necessary to resist sexual urges and advances; the proportion of youth who commit to abstain from sexual activity until marriage; the proportion of participants who intend to avoid situations and risk, such as drug use and alcohol consumption, which make them more vulnerable to sexual advances and urges. U.S. DEP'T OF HEALTH & HUMAN SERVS., SPRANS COMMUNITY BASED ABSTINENCE EDUCATION PROGRAM, PRE-APPLICATION WORKSHOP, at <http://www.hrsa.gov/grants/preview/guidancemchb/hrsa04077.htm> (last accessed July 2, 2004).

52. See COLLINS ET AL., *supra* note 13, at 11.

53. See, e.g., Douglas Kirby et al., *The Impact of Postponing Sexual Involvement Curriculum among Youths in California*, 29 FAM. PLAN. PERSP. 100, 100-08, <http://www.guttmacher.org/pubs/journals/2910097.html> (last accessed May 20, 2004).

54. *Id.*

55. See Peter S. Bearman & Hannah Bruckner, *Promising the Future: Virginity Pledges and First Intercourse*, 106 AM. J. SOC. 859, 859-912 (2001).

56. See *id.*

57. See *id.*

groups, forcing all students to take the same pledge renders ineffective any positive attribute that a pledge might have had.

None of this information concerning the inefficacy of abstinence-only programs is news. Scientists and sex educators for the better part of this decade have warned of the ineffectiveness of abstinence-only programs. The outcry against these programs is also not new, but these voices have been largely ignored. In 2001, recognizing abstinence-only's ineffectiveness, the Institute of Medicine issued its report, "No Time to Lose," recommending eliminating federal, state, and local "requirements that public funds be used for abstinence-only education, and that states and school districts implement and continue to support age appropriate comprehensive sex education and condom availability in schools."⁵⁸

Failing to acknowledge abstinence-only programs' shortcomings is problematic; the more troubling aspect of the recent administration's efforts to push abstinence-only programs is that federal agencies are actively distorting scientific evidence to suit the administration's ideological goals. For example, on its website, the Centers for Disease Control ("CDC") previously made available a review of sex education programs that were found to be effective, based on scientific evaluation.⁵⁹ Called "Programs That Work" ("PTW"), the site identified five comprehensive sex education programs, but no abstinence-only programs.⁶⁰ This website was changed during the current Bush administration so that visitors for a period of time received a message: "Thank you for your interest in Programs That Work (PTW). The CDC has discontinued PTW and is considering a new process that is more responsive to the changing needs and concerns of state and local education and health agencies and community organizations."⁶¹ Now a visitor attempting to access this site is automatically redirected to a site called Monitoring Health Behaviors: YRBSS. "Youth Risk Behavior Surveillance System—The YRBSS monitors priority health risk behaviors that contribute markedly to the leading causes of death, disability, and social problems among youth and adults in the United States."⁶² Apparently there are no programs that work to respond to the current administration's "changing needs."

58. M.S. RUIZ ET AL., *NO TIME TO LOSE: GETTING MORE FROM HIV PREVENTION* (2003), at <http://books.nap.edu/books/0309071372/html/index.html> (last updated 2003).

59. CDC, DEP'T OF HEALTH & HUM. SERVS., *PROGRAMS THAT WORK*, available at <http://www.cdc.gov/nccdphp/dash/rtc/index.htm> (on file with author).

60. *Id.*

61. *Id.*

62. *See id.*

Also particularly disturbing is the Bush administration's misinformation regarding condoms. The CDC's website formerly posted a comprehensive fact sheet about condoms, including information on selection, use, and effectiveness of condoms.⁶³ This site also cited studies showing that condom education does not promote sexual activity, noting that "a World Health Organization review . . . found no evidence that sex education leads to earlier or increased sexual activity in young people."⁶⁴ This web information has been replaced under the Bush administration with a page that emphasizes condom failure rates, provides no instruction on condom use, but does discuss the benefits of abstinence.⁶⁵

II. Impact of Abstinence-Only Programs on HIV/STD Prevention

While the Bush administration has increased funding for ineffective abstinence-only programs, there has been a net decrease in the budget for domestic HIV prevention programs.⁶⁶ For many years, the rate of incidence of HIV infection in the United States diminished or held constant.⁶⁷ However, recent advances in retroviral therapies and other pharmaceuticals to fight opportunistic infections may have decreased the public's fear of HIV infection. With recent advancements, the public may be less likely to see the progression of HIV to what used to be referred to as "full blown AIDS," characterized by emaciated victims or by the purplish skin lesions brought on by Kaposi's sarcoma. The confidence brought on by the advancement of HIV treatment is also believed to have given the public a sense of false

63. *Id.*

64. *Id.*

65. *Id.* Outside of the sphere of educating this nation's youth, the Bush administration has made similar changes on the web site for the State Department's Agency for International Development ("USAID"). As late as February 2003, the pages stated that condoms are "highly effective for preventing HIV transmission" and were the "cornerstone of USAID's HIV prevention strategy." This page is no longer available; more recent web pages replacing it are less sanguine about the effectiveness of condoms.

66. See SIECUS, STATES' INCREASING BUDGET DEFICITS, EXPENDITURES ON SMALL POX VACCINATIONS LEAD TO CUTS IN HIV PREVENTION AND OTHER PUBLIC HEALTH SERVICES (Mar. 2003), at <http://www.siecus.org/policy/PUpdates/arch03/arch030052.html>; see also SIECUS, ABSTINENCE-ONLY EARMARKS SIGNIFY NEW FEDERAL FUNDING AGENDA (Apr. 2003), at <http://www.siecus.org/policy/PUpdate/arch03/arch030054.html>.

67. CDC, HIV/AIDS SURVEILLANCE REPORT (2002), available at <http://www.cdc.gov/hiv/stats/hasr1402.htm> (last accessed Nov. 19, 2003).

security in medicine's ability to treat HIV disease, causing many people to abandon safer sex practices.⁶⁸

Although teen pregnancy has leveled off in the past decade, the rates of STDs and HIV infection among people under the age of twenty-five are on the rise.⁶⁹ Of the approximately 40,000 new HIV infections that will be reported in the United States this year, half will occur in people who are under twenty-five years old.⁷⁰ About 10,000 of these diagnoses will be for people under twenty-two years of age.⁷¹

Because of the lack of symptoms during the latency period, many HIV positive young people were likely infected as teens. Studies of teenage sexual activity reveal that about fifty percent of teens are sexually active.⁷² In spite of claims that teaching adolescents about sex encourages them to engage in sexual practices, all scientific studies show that there is no effect, or in some cases, actually a delay in the onset of sexual activity, when a teen has received comprehensive sexual education.⁷³ Failing to properly educate children on ways to protect themselves against infection with a still deadly disease is unconscionable.

All young people are not at the same level of risk. MSM, bisexuals, transgender people, runaways, injection drug users, victims of sexual abuse, children in foster care, and incarcerated youth all have elevated levels of risk.⁷⁴ In many United States cities, the incidence of syphilis and gonorrhea has been on the rise, particularly among MSM.⁷⁵ Many scientists are concerned that this effect is evidence of an increased level of activity that would also put these same people at risk for HIV infection, and they predict future increased rates of HIV infection, especially among young MSM.⁷⁶

68. CDC, YOUTH RISK BEHAVIOR SURVEILLANCE—U.S., 1999 (2000), <http://www.cdc.gov/mmwr/PDF/SS/SS4905.pdf>. (last accessed June 18, 2004).

69. *Id.* The study also noted that a majority of these sexually active teens used condoms, and over 20% of the females reported using birth control pills.

70. *See id.*

71. *See id.*

72. KAISER FOUNDATION, FACT SHEET—TEEN SEXUAL ACTIVITY (2003), *available at* <http://www.kff.org/youthhivstds/3040-index.cfm> (last accessed Jan. 29, 2003).

73. *See* STAFF OF H.R. COMM. ON GOV'T REFORM, 108TH CONG., POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION 7 (Comm. Print 2003), *available at* http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf.

74. HIV Prevention Efforts Reach a Crossroad as Signs Point to Rising Infections: Meanwhile, Politics is Deciding Prevention Strategy, AIDS ALERT, June 1, 2003, *available at* 2003 WL 8735667.

75. *See id.*

76. *Id.*

Nationwide, the incidence of HIV infection remained fairly stable even among MSM in the early 1990s.⁷⁷ However, during 1999–2001, HIV infection among MSM rose 14%, while it rose 10% among heterosexuals.⁷⁸ In spring 2001, the CDC optimistically announced that in the following year, the incidence of new HIV infections would be reduced by 6% and by 2005 the incidence would be reduced by 50%.⁷⁹ Although it is impossible to pinpoint a cause for the turnaround, there is no evidence to show that the rates will be dropping at all.⁸⁰ Indeed, the new predictions are for increased incidence of new HIV infection. Whether or not this is the effect of failing to teach adolescents about safer sex techniques is unclear. What is clear is that federal spending to reduce the spread of HIV is being wasted if conflicting federally-funded programs stressing abstinence-only leave millions of teenagers unprepared to adequately protect themselves against HIV infection.

The CDC recently unveiled a new strategy to more efficiently control the spread of HIV transmission.⁸¹ One effort in this strategy will be increasing testing to identify people who are HIV infected.⁸² Because many HIV-infected people do not get tested until long after their infection, they may be spreading this infection unwittingly. The time between a person's infection and the manifestation of AIDS may

77. *Id.*

78. *Advancing HIV Prevention: New Strategies for a Changing Epidemic—U.S.*, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES (CDC), Apr. 18, 2003, available at <http://www.cdc.gov/hiv/partners/question.htm> (reporting that these increases are in the twenty-five states that had mandatory HIV reporting since 1994).

79. *See HIV Prevention Efforts Reach a Crossroad as Signs Point to Rising Infections: Meanwhile, Politics is Deciding Prevention Strategy*, AIDS ALERT, June 1, 2003, at 1–4, available at 2003 WL 8735667 (quoting Heather Boonstra, Senior Public Policy Associate for the Alan Guttmacher Institute).

80. *Id.*

81. *See Advancing HIV Prevention*, *supra* note 78.

82. *Id.*; see also *Primary and Secondary Syphilis Among Men Who have Sex with Men—New York City, 2001*, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES (CDC), Sept. 27, 2002, at 853–56, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5138a1.htm>; *Resurgent Bacterial Sexually Transmitted Disease Among Men Who Have Sex With Men—King County, Washington, 1997–1999*, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES (CDC), Sept. 10, 1999, at 773, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4835a1.htm>; DIVS. OF HIV/AIDS PREVENTION, CDC, *Advancing HIV Prevention: The Science Behind the New Initiative* (2003), at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5215a1.htm> (citing C. Ciesleski & H. Beidinger, *Emergence of Primary and Secondary Syphilis Among Men Who have Sex With Men in Chicago and Relationship to HIV Infection*, abstract included in the 7th Conference on Retroviruses and Opportunistic Infections, Chicago, Illinois, Jan. 30–Feb. 2, 2000)).

be as long as ten years.⁸³ Many HIV-infected people do not consider getting tested until they become ill with an opportunistic infection.⁸⁴ During the period that these people are positive and asymptomatic, they may be spreading HIV infection to others. Testing will help to identify these people earlier. The CDC projects between 180,000 to 280,000 United States citizens are unknowingly infected with HIV.⁸⁵ It is hoped that early diagnosis will lead to less infection, as people who are diagnosed HIV positive are far more likely to practice safer sex or abstinence after learning of their infection.⁸⁶

One difficulty with this new CDC strategy is getting young people tested for infection with HIV. Even sexually active teens are unlikely to get tested for HIV infection.⁸⁷ Only about one-fourth of sexually active fifteen to seventeen year olds report ever having been tested for HIV.⁸⁸ The CDC's new approach to testing will apportion more resources to ensure people infected with HIV are identified and counseled to reduce engagement in high risk behaviors.⁸⁹ The CDC will also expand programs to help people learn their HIV status and develop prevention programs specifically for people with HIV.⁹⁰ The recent development of a quicker test that is easier to read may also aid in this effort.⁹¹ Previously, there was a week or more delay from the time of testing to the presentation of the results.⁹² Many people who

83. See E.J. Brown & E.M. Simpson, *Comprehensive STD/HIV Prevention Education Targeting U.S. Adolescents: Review of an Ethical Dilemma and Proposed Ethical Framework*, 4 *NURSING ETHICS* 339, 339-49 (July 7, 2000).

84. See DIVS. OF HIV/AIDS PREVENTION, CDC, *Advancing HIV Prevention: The Science Behind the New Initiative* (2003), at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5215a1.htm> (citing D.A. MacKellar et al., *Unrecognized HIV Infection, Risk Behaviors, and Mis-perceptions of Risk Among Young Men Who Have Sex With Men—6 U.S. Cities, 1994-2000*, abstract in the XIV International AIDS Conference, Barcelona, Spain, July 5-12, 2002).

85. This is about 25% of all people living with HIV in the United States. See *Advancing HIV Prevention*, *supra* note 78.

86. See *Adoption of Protective Behaviors Among Persons with Recent HIV Infection and Diagnosis—Alabama, New Jersey and Tennessee, 1997-98*, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES (CDC), June 16, 2000, at 512-15, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4923a2.htm>.

87. Press Release, Kaiser Foundation, M.T.V. & Teen People, *What Teens Don't Know About STDs Puts Them at Risk: A National Survey Finds Few Sexually Experienced 15-17 Year Olds Get Tested for STDs, And Most Underestimate Their Risk* (Mar. 8, 1999) (on file with author), available at <http://www.kff.org/youthhivstds/1465-stds.cfm>.

88. *Id.*

89. See *Advancing HIV Prevention*, *supra* note 78.

90. See *id.*

91. See *id.*

92. *Id.*

are tested fail to ever return for the results.⁹³ On-the-spot results could ensure that more infected people learn of their status. The CDC is also offering grants for training clinic workers to administer and interpret the tests.⁹⁴ Immediately following the tests, infected persons can be identified. Presumably, this will lead to increased adherence to safer sex practices and an eventual lowering of the HIV incidence rate.

HIV/AIDS prevention education has been funded by the CDC since 1988.⁹⁵ In 2000, the CDC budgeted \$47 million for in-school HIV education.⁹⁶ These funds were to be directed "toward strengthening national efforts for coordinated school health education."⁹⁷ The funding is shared by forty-eight states and the District of Columbia.⁹⁸ The schools receiving this funding must have their curriculum reviewed, following Guidelines for Effective School Health Education to Prevent the Spread of AIDS, which recommends a comprehensive education to protect the students.⁹⁹

The Deputy Director of the National Center for HIV, STD, and TB Prevention at the Centers for Disease Control, Ronald Valdiserri, has counseled clinicians that the most effective interventions promote personal intervention skills and promote changes in sexual and drug use behavior, including increasing condom use.¹⁰⁰ None of his recommendations include teaching abstinence-only. In spite of the experts' advice, in 2002 the federal government provided more than \$100 million for abstinence-only programs and another \$50 million of CDC

93. *Id.*

94. *See id.*

95. *See* KAISER FOUNDATION, SEX EDUCATION IN THE U.S.: POLICY AND POLITICS 2 (1994), available at <http://www.kff.org/womenshealth/loader.cfm?url=/Commonspot/security/getfile.cfm&PageID=14903> (last accessed Aug. 29, 2004).

96. *See* KAISER FOUNDATION, SEX EDUCATION IN THE U.S.: POLICY AND POLITICS (1994), at <http://www.kff.org/womenshealth/loader.cfm?url=/Commonspot/security/getfile.cfm&PageID=14903> (last accessed Aug. 29, 2004).

97. KAISER FOUNDATION, ISSUE UPDATE (Oct. 2002), at <http://www.kff.org/womenshealth/loader.cfm?url=/Commonspot/security/getfile.cfm&PageID=14903> (last accessed Aug. 29, 2004) (citing CDC, SCHOOL HEALTH PROGRAMS: AN INVESTMENT IN OUR NATION'S FUTURE 2 (1999)).

98. *Id.* Ohio and Utah are the only states that do not accept this funding.

99. *See* Guidelines for Effective School Health Education to Prevent the Spread of AIDS, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES (CDC), Jan. 29, 1988, at 1-14, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001751.htm>.

100. *See* HIV Prevention Efforts Reach a Crossroad as Signs Point to Rising Infections: Meanwhile, Politics is Deciding Prevention Strategy, AIDS ALERT, June 1, 2003, at 6, available at 2003 WL 8735667.

funding for HIV/STD prevention funding that was earmarked for abstinence-only programs.¹⁰¹

Social conservatives also wanted to insert language into a House bill that would make abstinence a priority in HIV/AIDS prevention,¹⁰² in spite of the fact that abstinence-only adolescent sexuality education conflicts with effective HIV prevention education. This conflict is most unreasonable under SPRANS-CBAE, which forbids recipients from teaching anything other than abstinence in their programs, regardless of the source of any other funding.¹⁰³

By abandoning frank and scientifically proven methods of protecting adolescents from unintended pregnancy and STDs and embracing abstinence-only programs, the current administration not only squanders taxpayer funds, but interferes with public health efforts to reduce the incidence of STDs, including HIV/AIDS.

III. Sexual Education and the Exclusion of Gay and Lesbian Students

As ineffective as abstinence-only-until-marriage education is in protecting adolescents in general, it is wholly inapplicable to gay and lesbian adolescents. In abstinence-only-until-marriage classes, students are told they must remain abstinent until they are married. Although eventually these students will grow up and make choices for themselves, the government is attempting to coerce ideological goals, specifically in reinforcing marriage as the norm. "[T]he government is attempting to compel marriage through sex-education by teaching teenagers that marriage is the only acceptable condition for sexual expression."¹⁰⁴ This seems somewhat cruel, as there is a certain percentage of these students who may have no legal opportunity to engage in marriage: students who are lesbian or gay.¹⁰⁵ In effect, these students are being told that they should never have sex.

101. See *id.* at 3.

102. *Id.* at 1–4 (quoting Heather Boonstra, Senior Public Policy Associate for the Alan Guttmacher Institute).

103. See Notice of Availability of Funds, 68 Fed. Reg. 68,632–03 (Dec. 9, 2003), *available at* 2003 WL 22885319.

104. Ruthann Robson, *Assimilation, Marriage and Lesbian Liberation*, 75 TEMP. L. REV. 709, 798 (2002) (including an in-depth discussion on the conflation of marriage and abstinence-only education for both adolescents and welfare recipients).

105. The actual percentage is widely debated, but the actual number is not really relevant for the purposes of this discussion. Constitutional infringements by laws are not minimized by the fact that it affects relatively few people. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 837–838 (1992) ("The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity,

The evolution of the recognition of privacy rights from *Griswold v. Connecticut*,¹⁰⁶ *Eisenstadt v. Baird*,¹⁰⁷ *Roe v. Wade*,¹⁰⁸ *Planned Parenthood v. Casey*,¹⁰⁹ and now *Lawrence v. Texas*,¹¹⁰ has revealed citizens' rights of autonomy over their bodies from their right to use contraception, to have an abortion, and now the right to choose with whom they share sexual relations.¹¹¹ Efforts through abstinence-only-until-marriage programs to coerce gay and lesbian students to forever remain celibate make these programs incongruous with the students' future right to exercise the protections extended by this line of cases. In *Lawrence*, the Court stated, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate contact."¹¹²

Attempts to prevent unwanted pregnancy and STD infection through education are public health interventions. The federal programs in question fail to intervene in any meaningful way for gay and lesbian students. Although some abstinence-only programs are written as if lesbian and gay students do not exist,¹¹³ others take a decidedly anti-homosexual tone. Abstinence-only programs that discuss homosexuality often discuss it as a purely physical concept in terms of attraction only for sex and not in terms of relationships. A typical abstinence-only program, FACTS, defines homosexuality as a "persistent and predominant attraction of a sexual-genital nature to a person of one's own sex."¹¹⁴ Another program counsels parents and teachers that

since the proper inquiry is for whom the law is a restriction, not the group for whom it is irrelevant."). The recent Massachusetts Supreme Court ruling in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), permits same sex couples to legally marry in Massachusetts, for the time being. Efforts are underway at the state and federal level to undermine the effect of this ruling.

106. 381 U.S. 479 (1965) (invalidating state laws that denied married people access to contraceptives and contraceptive birth control counseling).

107. 405 U.S. 438 (1972) (invalidating a law that prohibited distribution of contraceptives to unmarried people).

108. 410 U.S. 113 (1973) (holding that a woman has a right to an abortion under a due process analysis).

109. *Casey*, 505 U.S. at 833 (ruling on a state law forbidding spousal consent requirements for abortion).

110. 539 U.S. 558 (2003).

111. *Id.* at 578.

112. *Id.* at 562.

113. See MARTHA E. KEMPNER, SEICUS, TOWARD A SEXUALLY HEALTHY AMERICA: ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS THAT TRY TO KEEP OUR YOUTH SCARED CHASTE 47 (2001), at http://63.73.227.69/pubs/tsha_scaredchaste.pdf.

114. See *id.*

many homosexual activists are frustrated and desperate over their own situation and those of loved ones, many are dying, in part due to ignorance. Educators who struggle to overcome ignorance and instill self-mastery in their students will inevitably lead them to recognize that some people with AIDS are now suffering because of choices that they made.¹¹⁵

The message is clear—homosexuals are immoral.

Gay and lesbian teens being told to wait until marriage before engaging in sex is tantamount to telling them to never have sex unless laws prohibiting same sex marriage are rescinded or overruled. Federal funds are being expended to tell gay and lesbian youth that they will not have the autonomy over their bodies that *Lawrence* elucidates they will possess as adults. It is indisputable that almost half of all teens in the United States engage in sexual activity, and gay and lesbian teens are no different.

There is a diminishing conservative belief that lesbians and gays acquire their sexual orientation by their own personal choice or preference. Adherents to this notion may believe that lesbians and gays do indeed have the right to marry, provided they marry members of the opposite sex.¹¹⁶ Quoting *Casey* in *Lawrence*, Justice Kennedy wrote of similar choices, including the choice of with whom a person desires sexual relations:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹¹⁷

Extending this protection in *Lawrence*, Justice Kennedy wrote, "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."¹¹⁸ Obviously, the choice to marry someone who is not compatible with a person's own sexual orientation is meaningless. A meaningful marriage, reflecting the intimate choices guaranteed by the Constitution is not a certainty for gay and lesbian teens for the foreseeable future.

115. See *id.*

116. See *Lawrence*, 539 U.S. at 572–74.

117. *Id.* at 573–74 (citing *Casey*, 505 U.S. at 851).

118. *Id.* at 574.

The *Lawrence* decision takes pains to distinguish that the petitioners in that case were not minors.¹¹⁹ Although almost all of the students being taught through abstinence-only-until-marriage education are indeed minors, the decision in *Lawrence* recognizes the fundamental liberties that these students will enjoy as adults. The Court said, "The State cannot demean their existence or control by making their private sexual conduct a crime."¹²⁰ For their protection, adolescent students must be taught sexual education that is or will be relevant to their lives as an adult. The fact that they are not yet of the age of majority does not obviate the need to protect them from the adult activities in which almost half of them engage. Just as heterosexual adolescents must be protected from disease, gay and lesbian students must too.

In her concurring opinion in *Lawrence*, Justice O'Connor opined that the case could be correctly decided using an equal protection analysis.¹²¹ Even when there is no constitutional right at issue, under an equal protection analysis, all laws must meet at least a rational basis test.¹²² These abstinence-only programs are public health interventions, designed at their core to be ineffective for gay and lesbian adolescents. There is no rational basis for the exclusion of gay and lesbian students in these programs. If the federal government chose to exclude another minority group from the protection of another public health intervention, it would clearly be a violation of their right to equal treatment.¹²³ Equal protection demands an appropriate intervention for all of the nation's adolescents.

Abstinence-only-until-marriage education programs deny the rights of gay and lesbian adolescents to receive equal protection under the law in their attempts to protect adolescents against deadly disease. All abstinence-only-until-marriage federal funding programs implicate various constitutional prohibitions and are poor public policy for protecting this nation's youth. Congress must abandon funding for these discriminatory programs and channel these valuable resources towards proven public health interventions. Although it is unclear how a court might treat the disparities evidenced in these

119. *Id.* at 578 ("The present case does not involve minors.").

120. *Id.*

121. *Id.* at 579 (O'Connor, J., concurring).

122. See *Vance v. Bradley*, 440 U.S. 93, 99 (1979) (writing that "we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational").

123. See *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

programs, the evolving jurisprudence concerning equal treatment of gay and lesbians may also soon provide for the possibility of judicial intervention.

IV. Constitutional Limitations of Federal Funding for Abstinence-Only Education

Of the three federal programs to fund abstinence-only education, two are concerned specifically with educating school-aged children: Adolescent Family Life Act ("AFLA")¹²⁴ and Special Projects of Regional and National Significance—Community Based Abstinence Education ("SPRANS-CBAE").¹²⁵ The AFLA has been previously ruled not to violate the Establishment Clause of the Constitution "on its face,"¹²⁶ but with recent Supreme Court cases and the wealth of information concerning the inefficacy of abstinence-only programs, it should not survive further constitutional challenge. Even more troubling from a constitutional perspective than the AFLA is the more recent SPRANS-CBAE program, which will be discussed following a review of AFLA.

A. The Adolescent Family Life Act

Congress enacted the AFLA, a grant system, in 1981 in response to the "severe adverse health, social, and economic consequences" caused by pregnancy and childbirth to unmarried teenagers.¹²⁷ The grants were developed to fund public or non-profit private organizations "for services and research in the area of premarital adolescent sexual relations and pregnancy."¹²⁸ The grants had several purposes, including promoting "self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations."¹²⁹ The grant funds necessary services including "educational services relating to family life and problems associated with premarital sexual rela-

124. Adolescent Family Life Act, Pub. L. No. 97-35, 95 Stat 578 (codified as amended at 42 U.S.C. § 300z-300z-10 (1982 & Supp)).

125. There are similar public health issues involved and constitutional problems with the welfare "reform" legislation that are fully discussed in a number of excellent articles. For an in-depth discussion and constitutional analysis of this program, see Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence Only Until Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075 (2002).

126. See *Bowen v. Kendrick*, 487 U.S. 589, 602, 622 (1988).

127. See *Bowen*, 487 U.S. at 593 (quoting 42 U.S.C. § 300z(a)(5)).

128. *Id.* (quoting S. REP. NO. 97-161, at 1 (1981)).

129. See *id.*

tions."¹³⁰ The AFLA expressly requires the promotion of family support and the involvement of religious, charitable, and voluntary organizations;¹³¹ it expressly forbids funds from being used to fund, promote, or encourage abortion.¹³²

A constitutional challenge to the AFLA, based on First Amendment Establishment Clause grounds, was successful in the United States District Court for the District of Columbia, which ruled that, on its face, the AFLA had the primary effect of advancing religion.¹³³ The Supreme Court in *Bowen v. Kendrick* overruled the district court's ruling and held that the AFLA was facially constitutional, remanding with instructions to consider whether the individual grants to the various organizations have had the primary effect of advancing religion as applied.¹³⁴ The Court found no conflict in the fact that the desired effects of the legislation advancing certain morals "coincided" with religious groups' morals. Further litigation was pursued,¹³⁵ resulting in a settlement agreement providing that the AFLA funded programs may not be used at sites used for religious worship and that all the

130. 42 U.S.C. § 300z(1)(a)(4) provides in relevant part:

(4) "necessary services" means services which may be provided by grantees which are—

....

(E) referral for screening and treatment of venereal disease;

....

(G) educational services relating to family life and problems associated with adolescent premarital sexual relations, including—

....

(ii) education on the responsibilities of sexuality and parenting;

....

(iv) assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

....

(O) outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

....

(Q) such other services consistent with the purposes of this subchapter as the Secretary may approve in accordance with regulations promulgated by the Secretary.

131. *Id.* § 300z(a)(10)(C).

132. *Id.* §§ 300z-3(b)(1), 300z-10(a).

133. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1560 (D.D.C. 1987), *rev'd*, 487 U.S. 589 (1988), *and remanded to* 703 F. Supp. 1 (D.D.C. 1989). For further details of the history of abstinence-only education, see generally Jones, *supra* note 125.

134. See *Bowen v. Kendrick*, 487 U.S. 589, 622 (1988).

135. See *Bowen*, 703 F. Supp. 1 (on remand).

information must be medically accurate.¹³⁶ As the case was settled, no further judicial inquiry on this issue took place.

At the time of this constitutional challenge, the effectiveness of abstinence-only programs had not yet been evaluated. In his opinion, Chief Justice Rehnquist noted that it was Congress's judgment that religious organizations could help the problem that the AFLA sought to ameliorate.¹³⁷ He stated that "Congress found, 'prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties.'" ¹³⁸ This "finding," however, has been proven to be completely without merit, as no scientific studies support abstinence-only education as an effective method to protect teens from problems associated with sexual activity.¹³⁹ By applying Chief Justice Rehnquist's same analysis today, it is obvious that the AFLA no longer complies.

The Court in *Bowen* employed a three prong test, first articulated in *Lemon v. Kurtzman*,¹⁴⁰ to evaluate if the AFLA violated the Establishment Clause. The test holds that a state action violates the Establishment Clause if it is motivated only by an impermissible purpose, its primary effect is the advancement of religion, or if it requires excessive entanglement of the church and state.¹⁴¹

Under the first prong, the Court in *Bowen* found that the creation of the AFLA was motivated by a secular purpose, eliminating or reducing problems caused by teenage sexuality.¹⁴² The Court found no evidence that the actual purpose in enacting the AFLA was to endorse religion, nor did the Court doubt that Congress's expressed purposes were sincere.¹⁴³ Likewise, in assessing the third prong of the *Lemon* test, the Supreme Court disagreed with the district court's conclusion that the AFLA was an excessive entanglement between the church and

136. See Jones, *supra* note 125, at 1080–81 (citing D. DALEY, SIECUS, EXCLUSIVE PURPOSE: ABSTINENCE-ONLY PROPONENTS CREATE FEDERAL ENTITLEMENT IN WELFARE REFORM, (Apr.–May 1997), <http://www.siecus.org/siecusreport/volume25/25-4.pdf>.); see also ALAN GUTTMACHER INST., SETTLEMENT IN AFLA LAWSUIT, PAVING WAY FOR PROGRAM CHANGES, OVERSIGHT, WASH. MEMO 3–4 (Feb. 9, 1993).

137. See *Bowen*, 487 U.S. at 607.

138. *Id.* (citing 42 U.S.C. § 300z(a)(10)(A)).

139. See STAFF OF H.R. COMM. ON GOV'T REFORM, 108TH CONG., POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION 4 (Comm. Print 2003), available at http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf.

140. 403 U.S. 602 (1971).

141. See *Bowen*, 487 U.S. at 602.

142. *Id.* at 603.

143. *Id.* at 604.

the state.¹⁴⁴ This conclusion has not likely been affected since the decision.

As the Court reasoned, the second prong of the *Lemon* test, whether the statute has the primary effect of advancing religion, is more difficult to assess.¹⁴⁵ Because many religious groups were recipients of the funding for their role in educating teens under the AFLA, the district court was far more skeptical of the primary effects than was the Supreme Court.¹⁴⁶ The Supreme Court noted that the AFLA expressly stated "the problems of teenage sexuality were best approached through a variety of integrated and essential services provided to adolescents and their families by . . . religious organizations."¹⁴⁷ Although this may have been accurate at the time *Kendrick* was decided, the passage of time has changed the outcome of this application of the *Lemon* test. As all scientific evidence points to the ineffectiveness of abstinence-only education in achieving the stated purpose, it is now incontrovertible that these approaches are no longer an effective way to approach problems of teenage sexuality.

The Court held that any effect of advancing religion under the AFLA was "at most 'incidental and remote.'"¹⁴⁸ The Court noted that the moral views advanced by the AFLA were not necessarily religious in nature, but more accurately coincided with the moral views advanced in the legislation.¹⁴⁹ However, with the current knowledge of the ineffectiveness of these programs, it is clear that the "primary effect" of the legislation has not been to address issues of teen sexuality, but rather to impose a set of morals. This particular set of morals must be examined to determine if they are indeed advancing religion.

There are many differing moral views concerning sexual education of adolescents, but the moral views embraced in all of these abstinence programs appear only to decidedly further certain religious goals. Morals are certainly not always religious in nature. Communities may have a moral sense that is not rooted in religion. The Supreme Court has, in fact, on numerous occasions, relied on the morals of the majority. In the recently overruled *Bowers v. Hardwick*,¹⁵⁰ for example, the Supreme Court opined on the effect of the major-

144. *Id.* at 617.

145. *Id.* at 604.

146. See *Kendrick v. Bowen*, 657 F. Supp. 1547, 1557 (D.D.C. 1987), *rev'd*, 487 U.S. 589 (1988).

147. *Bowen*, 487 U.S. at 606.

148. *Id.* at 607 (citing *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984)).

149. *Id.* at 612-13.

150. 478 U.S. 186 (1988).

ity's morality on the law: "[The respondent] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of 25 states should be invalidated on that basis."¹⁵¹

Community morals can be described as what is thought to be correct or good by the great majority of competent persons.¹⁵² In fact, the majority of parents in the United States believe that adolescents should receive comprehensive sex education to prevent unwanted pregnancies and STDs.¹⁵³ Given the majority belief of parents regarding sexual education, the imposition of a certain moral set that is not shared by the majority is evidence of an imposition of another set of morals and values—those being religious morals and values regarding abstinence. Combining the idea that the AFLA furthers religious morals with the lack of scientific evidence showing that it furthers any other purpose, it is now clear that the AFLA's primary effect is the advancement of religion by the government.

Some abstinence-only programs being run by religious organizations, in fact, make little effort to hide their religious goals. One program's curriculum states that "religions vary, but every religious scripture has a clearly worded warning about the dangers of misusing sex," then supports this assertion with quotes from the New Testament, the Old Testament, the Dhammapada, the Quran, and the Bhagavad-Gita.¹⁵⁴ The curricular materials add their own legal disclaimer distinguishing that the above is not an attempt to teach religion in school, but an attempt to teach about religion—comparative religion, for example—which was a recommendation made by the United States Supreme Court when they restricted prayer in the public school settings.¹⁵⁵ This is just one blatant example, but many abstinence-only programs rely on a "universal" moral code concerning sexual behavior. Although "many adults believe premarital sexual behavior is wrong or unwise, it is not a universally held belief."¹⁵⁶

Previously, the Court ruled that the morals being forwarded in the AFLA just happened to coincide with a certain set of religious

151. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

152. See *Lawrence*, 539 U.S. at 605-06 (Thomas, J., dissenting) (criticizing the majority for not recognizing a majoritarian view of morality).

153. KAISER FOUNDATION, SEX EDUCATION IN AMERICA, *supra* note 12.

154. See KEMPNER, *supra* note 113, at 16.

155. See *id.*

156. See *id.*

morals and therefore did not violate the Establishment Clause.¹⁵⁷ Now that it is apparent that the morals of the majority of the community in question do not coincide with abstinence-only programs' morals, it is no longer possible to claim that these funds are not advancing a particular religious viewpoint. The AFLA should not now survive a *Lemon* analysis as applied in *Kendrick* and must be struck down as unconstitutional. Other abstinence-only legislation is even more seriously flawed and should also be struck down or repealed.

B. Special Projects of Regional and National Significance—Community Based Abstinence Education

SPRANS-CBAE grants are available only for recipients who do not also teach comprehensive sexual education, regardless of their funding source for these activities. Funding for SPRANS-CBAE is authorized through a block grant made available to the Secretary of the Department of Health and Human Services.¹⁵⁸ In addition to the fact that all of the abstinence-only education funding programs should be dismantled due to their ineffectiveness, SPRANS-CBAE violates both the Establishment Clause and also the unconstitutional conditions doctrine with its impermissible restrictions on speech.

The doctrine of unconstitutional conditions forbids the government from granting benefits with a condition that its recipients forego a constitutional right.¹⁵⁹ Even when a person does not have a right to a government benefit, that benefit may not be denied upon the condition of infringing on fundamental constitutional rights, including freedom of speech.¹⁶⁰ In *Sinderman*, the Court ruled that if it were permissible to deny funding to persons based on their giving up a fundamental right, it could "produce a result which [it] could not command directly."¹⁶¹ SPRANS-CBAE abstinence-only funding programs run afoul of the unconstitutional conditions doctrine by forbidding protected speech as a condition for receipt of its funds. SPRANS-CBAE violates this doctrine because it prohibits any recipient of these funds from teaching comprehensive sexual education, even if the recipient is not using these SPRANS-CBAE funds for this purpose. This

157. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988).

158. 42 U.S.C. § 701(a)(2) (2003) provides for funds to enable the secretary to "provide special projects of regional and national significance," ostensibly for mother and child health services.

159. See Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

160. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

161. *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

restriction requires them to forego their First Amendment right to freedom of speech in return for receiving the funds, an impermissible condition to receiving federal funds.

Prior to 1991, the unconstitutional conditions doctrine was clearer in application than under current jurisprudence. In that year, the Supreme Court broke from the established unconstitutional conditions doctrine by ruling that Health and Human Service regulations that prohibited Title X funding to family counseling organizations that discussed abortion as a lawful option did not violate the Constitution.¹⁶² Litigants in *Rust v. Sullivan* claimed that the statutes, which made funding for reproductive services conditional on not discussing abortion, deprived them of their First Amendment right to free speech by denying their ability to discuss a constitutionally protected activity, abortion.¹⁶³

Chief Justice Rehnquist wrote in *Rust* that the program did not infringe on the litigants' free speech rights, as the petitioners were still free to discuss abortions on their own, outside *the clinical setting* that was funded with Title X dollars.¹⁶⁴ The regulations only prohibited them from counseling about abortion while engaged in the federally funded clinic's activities.¹⁶⁵ Justice Rehnquist stated that talking about abortion in the context of providing these reproductive services was not even speech—it was an activity.¹⁶⁶ He also noted that the government has a right to selectively support certain activities that it finds to be in the public interest to the exclusion of others.

It seems that the authors of the regulations implementing SPRANS-CBAE were well aware of the ruling in *Rust*, as the language of the program is clearly patterned after the reasoning articulated in *Rust*. The program requires that “[p]rojects must clearly and consistently focus on the designated definition of ‘abstinence education’ and applicants must agree not to provide a participating adolescent any

162. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that Title X funding did not violate the unconstitutional conditions doctrine).

163. *Id.* at 181.

164. *Id.* at 178.

165. 42 C.F.R. § 59.9 (1989) states:

The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

Id. (emphasis added).

166. See *Rust*, 500 U.S. at 193–94.

other education regarding sexual conduct *in the same setting*.”¹⁶⁷ SPRANS-CBAE attempts to skirt the application of the doctrine by adopting similar language to that used in *Rust*.

SPRANS-CBAE is distinct from Title X programs, as the Court stated in *Rust* that the recipient of Title X funds could always engage in abortion-related speech outside of the scope of the activity funded by Title X:¹⁶⁸

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.¹⁶⁹

This is clearly impossible with SPRANS-CBAE. Although SPRANS-CBAE allows receipt of funds to teach comprehensive sexual education in a different setting, there is no alternative setting in which recipients could feasibly do this. Educators cannot call together groups of students to discuss sex education outside of the sanctioned school settings for sexual education. Any adults approaching children outside of the sanctioned settings to discuss sex would likely attract law enforcement interest, horrify parents, and confuse and likely frighten the children they are attempting to protect. Because there is no alternative setting, SPRANS-CBAE effectively bars recipients from teaching comprehensive sexual education at all. SPRANS-CBAE limits access to children by comprehensive sex educators, but as many school districts are in dire need of the federal subsidy this program provides, they must choose an alternative and ineffective program to qualify for these funds.

Although *Rust* limited the scope of unconstitutional conditions challenges, in a later district court ruling on the issue, *Planned Parenthood of Central Texas v. Sanchez*,¹⁷⁰ the court distinguished the effect of *Rust* from a constitutional challenge to a condition imposed by a rider of a Texas statute that forbade disbursement of family planning funds to groups that performed abortions, even if the abortions

167. Community-Based Abstinence Education Project Grants, 68 Fed. Reg. 68,632-03 (Dec. 9, 2003) (emphasis added).

168. See *Rust*, 500 U.S. at 198.

169. *Id.* at 198 (citing *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983)).

170. 280 F. Supp. 2d 590, 593 (W.D. Tex. 2003).

were paid for solely from private funds.¹⁷¹ Because the rider was found to withhold funding from a recipient based on their engaging in a constitutionally protected activity, the rider was ruled to be an unconstitutional condition on the receipt of the government funds.¹⁷²

The restriction in *Sanchez* was distinct from the restriction in *Rust* because in *Sanchez*, the funding condition totally restricted the protected activity, i.e., recipients could not provide or discuss abortions regardless of the funding source. Whereas in *Rust*, it was more limited, i.e., recipients could not discuss abortions in the clinical setting that was funded by Title X money, but could do so in other contexts.

Sanchez distinguished the refusal to fund an entity because of protected activities that it may engage in using non-Title X funds. In *Sanchez*, the court ruled that although a refusal to fund abortions does not run afoul of the unconstitutional conditions doctrine, the total refusal to fund recipients because they provide abortions using private funds did.¹⁷³ The practical impact of the Texas rider would have been to shut down private resources for abortions, not simply to refuse to pay for abortions with government funds. Similarly, SPRANS-CBAE requires that any recipient teach *only* abstinence-only in order to receive these funds.¹⁷⁴ The programs designed to teach students are not merely protected speech; they are public health interventions, activities to promote the health and safety of adolescents. The recipient is not permitted to teach any other form of sex education in the same setting, *regardless of the source of the funding* for such programs.¹⁷⁵ This intervention is analogous to the impermissible restriction in *Sanchez* that attempted to restrict a clinic's ability to provide abortions in the same setting using separate private funds.

In spite of careful crafting to avoid the unconstitutional conditions doctrine, SPRANS-CBAE goes too far in attempting to stifle more effective public health interventions. The AFLA abstinence-only programs do not prohibit schools or school districts from teaching programs other than abstinence-only, but the funds received under the AFLA are to be used only to fund abstinence-only education. Because states could, and many did, use alternative funds to teach comprehensive sex education, the AFLA did not violate the constitutional

171. See *id.* at 593.

172. *Id.*

173. See *Sanchez*, 280 F. Supp. 2d at 609.

174. See Notice of Availability of Funds, 68 Fed. Reg. 68,632 (Dec. 9, 2003).

175. *Id.*

conditions doctrine as applied in *Rust*. This is not the case with SPRANS-CBAE.

In another case post-*Rust*, the Children's Internet Protection Act ("CIPA") was held not to violate the unconstitutional conditions doctrine.¹⁷⁶ CIPA required libraries to use Internet filters as a condition to receiving certain federal subsidies for providing Internet access to library patrons.¹⁷⁷ Justice Rehnquist asserted that the federal government had not penalized libraries that chose not to install the required filtering software; it had just decided not to subsidize unfiltered access to the Internet.¹⁷⁸ Congress was simply insisting that "public funds be spent for the purposes for which they were authorized."¹⁷⁹ The Court found that the use of filtering programs helped to carry out a libraries' mission, and thus, the condition was permissible under a *Rust* analysis.¹⁸⁰

Library might appear to support an argument that Congress can choose to fund certain content-based restrictions on speech. The plurality in *Library* relied on *Rust* in determining that Congress may insist that "public funds be spent for the purposes for which they were authorized."¹⁸¹ The public funding grant in CIPA did not attempt to prevent libraries from using their own funding to provide printed and Internet material, but rather set conditions on the use of federal funds for Internet access. *Library* also noted that libraries are not repositories for all printed materials and that choices were routinely made as to which items were to be made available to the public.¹⁸² The Court analogized the situation in which a public television station did not violate principles of free speech by rejecting private speech in its editorial judgment.¹⁸³

Library is easily distinguished from a SPRANS-CBAE analysis, as the issue is not one of conflicting and overwhelming private speech as in libraries where the open expanse of the Internet offers seemingly endless quantities of pornography and adult-oriented content. The outside world is not clamoring to demand access to the classroom to

176. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 211–13 (2003).

177. See *id.* E-rate and LSTA were federal programs intended to help library patrons obtain material for informational and educational purposes through Internet access in public libraries.

178. See *id.* at 211–13.

179. *Id.*

180. See *id.*

181. *Id.*

182. See *id.* at 202–05.

183. *Id.* (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–673 (1998)).

inflict various opinions and patently commercial appeals on the nations' adolescents. Organizations committed to protecting children's health are being denied an opportunity to receive federal funds ostensibly offered to groups in efforts to reduce teen pregnancies and STD incidence. SPRANS-CBAE is an impermissible restriction on the ability of schools to adequately educate their students because schools or organizations accepting SRPANS-CBAE funds are forbidden from providing information that is effective in reducing the incidence of unintended teen pregnancy and spread of STDs. In *Library*, the librarians were put in the position of filtering out some content that might be offensive. In terms of SPRANS-CBAE, the speech being stifled is the speech that a majority of parents would like their children to hear.¹⁸⁴

The Court also previously analyzed the unconstitutional conditions doctrine for an art-funding program that used content-based criteria in its funding decisions in *National Endowment for the Arts v. Finley*.¹⁸⁵ In *Finley*, the court examined funding conditions placed on grants made pursuant to the National Endowment for the Arts and held that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding."¹⁸⁶ The Court relied on the subjective nature of decisions to fund any particular type or piece of art for its holding. This situation could not be more inapposite to the nature of public health education. Content-based decisions, such as a decision to fund abstinence-only education, when it is clearly ineffective, is not in the nature of public health funding because such funding is not based on a subjective determination. Rather, public health interventions have their genesis in scientific evaluation. Unlike art or editorial content, public health interventions can be evaluated and verified.

In his concurring opinion in *Library*, Justice Breyer argued that a heightened standard of scrutiny should be applied where "competing constitutional interests are potentially at issue."¹⁸⁷ Though he found that CIPA was constitutional under this heightened standard, Justice Breyer reminded the Court of past cases in which the Court asked

184. See discussion *supra* Part IV.A (concerning AFLA and community morals).

185. 424 U.S. 569 (1998).

186. *Id.* at 585.

187. See *Am. Library Ass'n.*, 539 U.S. at 216–18 (Breyer, J., concurring).

whether the harm to speech related interests is disproportionate in light of both the justifications and the potential alternatives:¹⁸⁸

"What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts . . . , a means narrowly tailored to achieve the desired objective."¹⁸⁹

Applying Justice Breyer's analysis to SPRANS-CBAE further illustrates that this law violates the unconstitutional conditions doctrine. Certainly, SPRANS-CBAE is not a reasonable fit to any permissible legislative end. If the purpose is to reduce unwanted pregnancy and reduce transmission of STDs among adolescents, it is now clear, given the objective scientific evidence, that the method chosen does not at all fit the end. *Rust* held that unequal subsidization of one activity to the exclusion of another is allowable if the point is to further permissible goals, so long as alternative means of exercising fundamental rights exist. With SPRANS-CBAE, clearly this distinction is not met. SPRANS-CBAE fails in its stated goals and must be dismantled, if not directly by the HHS, then by refusal by Congress to fund the program or through court challenges.

V. After Dismantling Abstinence-Only Programs

Once the AFLA and SPRANS-CBAE have been dismantled, the federal government should divert its funding and attention to funding comprehensive sexual education to help reduce unintended pregnancies and the spread of STDs. Comprehensive educational outreaches could only help to further reduce the incidence of unwanted teen pregnancy and STDs. Congress should seek coordination for these efforts and those that seek to prevent HIV infection as well. The CDC should report scientifically valid information on its website and not be censored to promote only politically-based viewpoints. Just one program will not work for the entire nation. With a nation as large and as diverse as the United States, there must be some flexibility in the creation of effective programs.

188. *Id.* (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 740–47 (1997) (plurality opinion); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part); *Red Lion Broad. v. FCC*, 395 U.S. 367, 389–90 (1960)).

189. *Am. Library Ass'n.*, 539 U.S. at 218 (quoting *Fox*, 492 U.S. at 480) (internal quotations and citations omitted).

Parents with certain religious convictions who do not want their children exposed to comprehensive sex education may be concerned with these programs. Although a study showed over eighty percent of parents polled want their children to receive comprehensive sex education in school,¹⁹⁰ it is not necessary to compel every student to receive this instruction. Efforts should be made to educate as many adolescents as possible, as the larger the group of adolescents who are uneducated, the greater the potential for spreading STDs and incidence of unwanted pregnancy. Community standards should be examined to ensure the best approach is used for any given region, as is supported by rigorous scientific research.

Studies have shown that, in order to be most effective, programs should be tailored to their participants.¹⁹¹ Teen sexuality education is and should remain a public health issue, not a political or religious forum. Conflicts occur between public health programs and religious principles in other issues such as mandatory vaccination laws requiring all states to administer diphtheria, measles, and rubella vaccines.¹⁹² Medical exceptions permit children allergic or susceptible to adverse reactions with an opportunity to avoid vaccination.¹⁹³ Compulsory vaccinations may indeed violate certain religions' edicts, yet they have never been ruled unconstitutional.¹⁹⁴ Although not required under the Federal Constitution, all but two states currently permit parents to opt their children out of vaccination programs if they have religious objections.¹⁹⁵

Likewise, states could, and should, permit religious exemptions for participants whose religious beliefs would be offended by comprehensive sexual education programs.¹⁹⁶ The First Amendment forbids Congress from making laws prohibiting the free exercise of relig-

190. SIECUS, PUBLIC SUPPORT FOR SEXUALITY EDUCATION (June 1999) at http://www.siecus.org/school/sex_ed/sex_ed0002.html (last accessed Feb. 23, 2003).

191. See discussion *supra* Part I.

192. See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW; POWER, DUTY, RESTRAINT 182-86 (Univ. of Cal. Press 2000).

193. *Id.* at 181.

194. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

195. Mississippi and West Virginia are those two states. See *Zucht v. King*, 260 U.S. 174 (1922) (holding that compulsory vaccinations are permissible as a condition to attending school).

196. Some states already do this. See FLA. STAT. ANN. § 1003.42(3) (West 2003) (allowing a student to be exempted from sex education or HIV/AIDS instruction).

Any student whose parent makes written request to the school principal shall be exempted from the teaching of reproductive health or any disease, including HIV/AIDS, its symptoms, development, and treatment. A student so exempted may not be penalized by reason of that exemption. Course descriptions for com-

ion.¹⁹⁷ Compulsory sex education may run afoul of this protection. When examining vaccination laws, the Supreme Court found that the right to the free exercise of religion does not obviate an adherent from compliance with a "valid and neutral law of general applicability."¹⁹⁸ Although most parents want their children to receive comprehensive sex education, the parallels between vaccination and sex education may not be close enough to warrant compulsory education on all teens. Most of the diseases for which pharmaceutical immunizations exist are not spread largely through sexual contact. The element of choice must also be considered when debating whether students should be able to "opt-out" of comprehensive sexual education training. Abstinence training may indeed be most appropriate for certain students immersed in their faith. Some students report that their religion is a main factor in keeping them celibate.¹⁹⁹ Their "freedom to act according to their religious beliefs is subject to a reasonable regulation for the benefit of society as a whole."²⁰⁰ Requiring adolescents committed to abstinence to undergo comprehensive sexual education may not be viewed as a reasonable regulation, despite the fact that not all of these students will likely remain celibate. Making any public health effort compulsory provokes popular resistance and fear or distrust of health officials. Therefore, compulsion should be avoided in public health efforts whenever possible.

Parents who choose to opt-out their children for religious reasons should be provided information concerning the public health risks to their children as a result of not being educated to protect themselves against pregnancies and STDs. Similar to the occurrence of disease outbreaks for which vaccines were available in various religious communities that refused vaccination for protection from these preventable epidemic diseases,²⁰¹ many students receiving abstinence-only training, including some of those who also take virginity pledges, fail in their goal to remain celibate. These students who receive no educa-

prehensive health education shall not interfere with the local determination of appropriate curriculum which reflects local values and concerns.

Id.

197. U.S. CONST. amend. I.

198. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990).

199. SIECUS, *THE TRUTH ABOUT ADOLESCENT SEXUALITY*, SIECUS FACT SHEET 6 (Fall 2003) (on file with U.S.F. Law Review), available at http://www.siecus.org/pubs/fact/FS_truth_adolescent_sexuality.pdf.

200. See *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 648 (Ark. 1965).

201. Children have died from preventable diseases because of their parents' refusal to have them immunized. Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws*, 282 J. AM. MED. ASS'N 47, 47-53 (1999).

tion to protect themselves from STDs and unintended pregnancy will be ill-equipped should they decide to engage in sexual behavior. Adding to this problem, many who engage in some sexual behaviors are not convinced these activities are sexual and thus do not fear the risk of sexually transmitted diseases.²⁰² Parents should be informed of these risks when opting their child out of comprehensive sexual education. In spite of their belief that their children will remain celibate, parents should be informed of the numbers of students who fail to remain chaste and of the potential repercussions of their failure not only to themselves but to others in the community as well.

Conclusion

Although the abstinence-only programs may have been born of a sincere desire to help adolescents avoid unintended pregnancy and STD infection, it is now clear they do not serve that purpose. Whether or not the moral values of the nation at one time supported denying adolescents access to potentially lifesaving information, as evidenced by the wishes of parents, they do not do so now. These programs are ineffective and a waste of taxpayer money.

If not dismantled for their ineffectiveness, these programs must be invalidated by the courts for their failure to comply with the Constitution. Both the AFLA and SPRANS-CBAE serve to further only the impermissible goal of advancing a particular religious viewpoint. SPRANS-CBAE further imposes unconstitutional conditions on the acceptance of federal funds, which also renders it unconstitutional. In addition, these programs fail to address gay and lesbian adolescents, marginalize them, and attempt to coerce them into sexless lives. The current administration should discard its plans to increase funding for these ineffective and unconstitutional programs and support coordinated, proven public health approaches to address the problems of unwanted pregnancy and STDs among this nation's adolescents.

Congress should act to ensure funding is diverted from these programs, by refusing to fund the AFLA and by eliminating the block grant that permits the Secretary of HHS the discretion to squander taxpayer money on SPRANS-CBAE. If Congress fails to act, the courts must strike down these funding programs or insist that the education of our nation's adolescents reflect that they live in the twenty-first century, not an imagined sexless era that exists only in 1950's sitcoms. Modern realities include the fact that, despite all efforts to the con-

202. See *supra* Part I (discussing definitions of sex and abstinence).

trary, many adolescents will engage in sex. Further, a substantial number of our nation's youth are being completely ignored, as the programs make no allowance that many of this nation's adolescents are lesbian or gay. Failure to protect teenagers with meaningful education will exacerbate the already alarming increase of STDs and HIV that is being documented among young people and in even higher rates among the nation's MSM.

Funding of these programs does not comport with the majority of the nation's morals. Instead, it furthers goals that were formerly seen as "coinciding" with religious ideals. Now that they have been stripped of their pretense of furthering permissible goals, abstinence-only education programs must be abolished and replaced with programs that actually work. With fierce competition for public funding, abstinence-only programs that not only are ineffective for their stated purpose, but also conflict with state and federal efforts to control disease, must be eliminated immediately.